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IN THE

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA, *et al.*,
Cross-Petitioners,

v.

CITY OF BURBANK, a municipal corporation and political subdivision of the State of California,
Cross-Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CITY OF BURBANK IN RESPONSE

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BRIEF OF THE CITY OF BURBANK IN RESPONSE

Cross-Respondent City of Burbank ("Burbank"), through counsel, submits this response to the Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit ("Cross-Petition") in the above-captioned action.

SUMMARY

Cross-Respondent does not object to consideration by the Court of the issues raised by cross-petitioners in their Cross-Petition if the Court also grants cross-respondent's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit ("Petition").[1] With one

[1]City of Burbank v. United States, *petition for cert. filed,* 51 U.S.L.W. 3,305 (U.S. Oct. 1, 1982) (No. 82-593).

notable exception, however, cross-respondent disagrees with the position cross-petitioners have taken in their Cross-Petition. That exception is cross-petitioners' concession that the amounts Burbank has paid, and continues to pay, to cross-petitioner Secretary of the Treasury are a federal tax.

The thrust of cross-petitioners' argument is that the district court lacks subject matter jurisdiction over Burbank's suit because the relief Burbank seeks is barred by the Anti-Injunction Act,[2] the federal tax exception to the Declaratory Judgment Act[3] and the doctrine of sovereign immunity.[4] The Anti-Injunction Act is inapplicable first because Burbank is seeking a refund of federal taxes paid and not an injunction prior to the payment of taxes, second because Burbank is not a "person" within the statutorily prescribed definition of that term and third because Burbank has no other adequate remedy at law. The federal tax exception to the Declaratory Judgment Act is inapplicable because it is only as broad as the Anti-Injunction Act. The doctrine of sovereign immunity does not apply because, through 28 U.S.C. § 1346(a)(1) (1976), cross-petitioners have consented to suit.

Cross-Petitioners also contend that Burbank lacks standing because the injury it alleges cannot be traced to any action on the part of cross-petitioners.[5] Nothing could be further from the truth. The California statute[6] which extends unemployment compensation coverage to Burbank's employees on the terms set forth in the Federal Unemploy-

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[2]26 U.S.C. § 7421 (1976 & Supp. V 1981).

[3]28 U.S.C. §§ 2201-2202 (1976).

[4]Cross-Petition at 6-11.

[5]*Id.* at 11-13.

[6]1978 Cal. Stat. Ch. 2.

ment Tax Act ("FUTA")[7], and which has necessitated Burbank's payments to the Secretary of the Treasury, expressly provides that it was enacted solely because of the Unemployment Compensation Amendments of 1976 ("1976 Amendments" or "Amendments"),[8] which amended the FUTA to require the States to extend unemployment compensation coverage to state and local employees. That statute also provides that, if this Court holds the 1976 Amendments to be unconstitutional, the provisions of the statute requiring coverage of state and local employees become inoperative. As such, the harm cross-respondent alleges is traceable directly to the actions of petitioners.

RESPONSE

I. The District Court Has Subject Matter Jurisdiction Over This Action.

A. Even Though the 1976 Amendments Impose a Federal Tax on State and Local Governments, the Anti-Injunction and Declaratory Judgment Acts Do Not Deprive the District Court of Subject Matter Jurisdiction.

Implicit in cross-petitioners' argument that the Anti-Injunction and Declaratory Judgment Acts bar this suit is cross-petitioners' recognition that the moneys which state and local governments now must pay the Secretary of the Treasury, pursuant to subsections 3304(a)(3),(6)(A) of the

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[7]26 U.S.C. §§ 3301-3311 (1976 & Supp. V 1981), *as amended by* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324.

[8]Pub. L. No. 94-566, 90 Stat. 2667.

FUTA, are a federal tax.[9] In order to obscure this concession, presumably due to cross-petitioners' awareness of cross-respondent's immunity from such federal taxation, and in order to attempt to bring this action within the confines of the Anti-Injunction and Declaratory Judgment Acts, cross-petitioners claim that cross-respondent "seeks to restrain the [federal] government from denying FUTA tax credits to private employers for their contributions to a state unemployment fund. . . ."[10] This, of course, is not the relief cross-respondent seeks. As a simple reading of the Complaint for Refund of Federal Taxes Illegally Collected ("Complaint")[11] plainly reveals, the relief cross-respondent seeks is: 1) a refund of the amount of federal taxes cross-respondent has paid for unemployment compensation coverage of its employees; 2) a declaratory judgment that the 1976 Amendments, to the extent that they require cross-respondent to provide unemployment compensation coverage to its employees, are unconstitutional; and 3) an injunction against enforcement of those provisions of the 1976 Amendments held unconstitutional.[12] Properly characterized, therefore, the Anti-Injunction and Declaratory Judgment Acts do not bar the relief cross-respondent seeks.

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[9]The tax exception to the Declaratory Judgment Act specifically provides that it is inapplicable "with respect to Federal taxes." 28 U.S.C. § 2201. With respect to the Anti-Injunction Act, this Court has held that it applies to "suits seeking injunctions prohibiting the collection of *federal taxes.*" Enoch v. Williams Packing & Navigation Co., 370 U.S. 1, 5 (1962) (emphasis added); *compare* 28 U.S.C. § 1341 (1976) (prohibiting district courts from enjoining the assessment or collection of state taxes).

[10]Cross-Petition at 6.

[11]City of Burbank v. United States of America, No. 80-00205 MML (GX) (C.D. Cal. June 20, 1980).

[12]Compl. *ad damnum* clause (Petition at 83a).

With respect to the Anti-Injunction Act, in *Enoch v. Williams Packing & Navigation Co.*,[13] the Court held that "[t]he manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund."[14] This is precisely the course cross-respondent has followed. Cross-Respondent has paid, and continues to pay, the amounts necessitated by the 1976 Amendments, and now has brought suit for a refund of these illegally assessed and collected amounts. As such, cross-respondent's actions are fully consistent with the declared goals of the Anti-Injunction Act.

Even if the Court were to determine that cross-respondent's suit is a suit for injunction rather than a suit for refund, the Anti-Injunction Act still would not apply. That Act only prohibits "persons" from seeking to restrain the assessment or collection of federal taxes. For purposes of Title 26, 26 U.S.C. § 7701 defines a "person" as "an individual, a trust, estate, partnership, association, company or corporation." This definition does not include states, cities or other political subdivisions, and, accord-

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[13]370 U.S. 1 (1962).

[14]*Id.* at 7. Cross-Respondent's request for injunctive relief was made to avoid the necessity of repeated refund suits if the 1976 Amendments are held unconstitutional. In Bob Jones Univ. v. Simon, 416 U.S. 725 (1974), the Court recognized that "it may be possible to conclude that a suit for a refund is not 'for the purpose of restraining the assessment or collection of any tax . . .,' and thus that neither the literal terms nor the principal purpose of § 7421(a) is applicable." 416 U.S. at 748 n. 22. To the extent that the Court has left this issue undecided, the instant suit provides the appropriate circumstances for resolution of this issue.

ingly, the Anti-Injunction Act remains unavailable as a bar to the instant action.[15]

Finally, even assuming that this is not a refund suit and that Burbank is a "person" within the meaning of that term, the Anti-Injunction Act still does not bar maintenance of this suit because cross-respondent's circumstances are such that it has no other adequate remedy at law. In *Williams Packing,* the Court held that the Act would not apply if a party would have no other adequate legal remedy.[16] Cross-Petitioner suggests that section 3310 of the FUTA, which allows a state to seek judicial review of a determination by the Secretary of Labor to decertify a state's unemployment compensation law found by the Secretary to be not in conformity with section 3304(a) of the FUTA, is an adequate legal remedy.[17] However, as the language of section 3310 specifically provides, that section is available only to a state. Therefore, a political subdivision, such as Burbank, may not avail itself of section 3310, and, as discussed more fully at 9-12 *infra,*

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[15]There are sound policy reasons, in the context of the Anti-Injunction Act, for excluding from the definition of "person" states and political subdivisions. As discussed in the Petition, at 20-25, the doctrine of intergovernmental tax immunity prohibits the federal government from imposing on the States and their political subdivisions a federal tax which would impair their ability to perform traditional governmental functions. The States and their political subdivisions should not be forced to seek relief by way of a refund suit, and thereby endure for the length of the suit, the potentially crippling consequences to their functions from an ongoing drain on their budgets due to the imposition of a federal tax. Rather, the States and their political subdivisions should be allowed to seek immediate relief from the federal government's interference.

[16]370 U.S. at 7; *see also* Bob Jones Univ. v. Simon, 416 U.S. 725, 737 (1974).

[17]Cross-Petition at 8-9.

California, while vigorously objecting to the 1976 Amendments and indicating its support for challenges to the Amendments, has determined not to take the steps necessary for section 3310 review. Accordingly, cross-respondent has no adequate remedy at law,[18] and the Anti-Injunction Act does not apply.

Just as the Anti-Injunction Act is inapplicable, so too is the federal tax exception to the Declaratory Judgment Act. This Court has held that the federal tax exception is as broad as the Anti-Injunction Act, but has declined to hold it to be broader.[19] Accordingly, the limits on the applicability of the Anti-Injunction Act should attach to the federal tax exception to the Declaratory Judgment Act, and thereby allow the declaratory relief cross-respondent seeks.[20]

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[18]Cross-Petitioners' suggestion that private employers, through a refund suit, adequately could protect the constitutional rights of cross-respondent, Cross-Petition at 7-8, is absurd. Certainly the federal government would not entrust to a private litigant the interests of the United States.

[19]Bob Jones Univ. v. Simon, 416 U.S. 725, 732 n. 7 (1974).

[20]It is noteworthy that, even in the case which cross-petitioners claim provides the basis for application of res judicata and collateral estoppel, County of Los Angeles v. Marshall, 631 F.2d 767 (D.C. Cir.), *cert. denied,* 449 U.S. 837 (1980) (Petition at 8a), Brief for the United States in Opposition at 4-6, City of Burbank v. United States, *petition for cert. filed,* 51 U.S.L.W. 3,305 (U.S. Oct. 1, 1982) (No. 82-503), the court rejected the federal government's argument that the Anti-Injunction and Declaratory Judgment Acts bar suits such as the instant suit. By failing to address the merits of either appellants' or appellees' position, and, instead, simply adopting the reasoning of the First Circuit in New Hampshire Dept. of Employment Sec. v. Marshall, 616 F.2d 240 (1st Cir.), *appeal dismissed* and *cert. denied,* 449 U.S. 572 (1980) (Petition at 31a), the District of Columbia Circuit implicitly rejected the contention that plaintiffs' suit was barred by the Anti-Injunction and Declaratory Judgment Acts because *New Hamp-*

B. Cross-Petitioners Have Consented To Be Sued.

Cross-Petitioners do not dispute that they are not immune from suit, under 28 U.S.C. § 1346(a)(1) (1976), for the recovery of illegally assessed or collected internal-revenue taxes.[21] Instead, they now claim, in direct contravention of the premise underlying their arguments based on the Anti-Injunction and Declaratory Judgment Acts, that the payments Burbank makes to the Secretary of the Treasury are a state tax.[22] These payments, however, cannot be both a federal tax and a state tax, and cross-petitioners must not be allowed to characterize them as such in order to deprive cross-respondent of all avenues of judicial review of the constitutional violations occasioned by the 1976 Amendments.

Further, in view of the procedural posture of the case, cross-petitioners' now convenient assertion as fact, that Burbank's payments to the Secretary of the Treasury are a state tax, cannot be accepted. This Court repeatedly has held that, for purposes of a motion to dismiss, the well-pleaded allegations of a complaint are treated as true.[23] Cross-Respondent's Complaint alleges that its payments are a federal tax.[24] Accordingly, its allegations, and not cross-petitioners' unsupported representations, are controlling. Any other result would allow cross-petitioners to

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shire was a challenge, under section 3310 of the FUTA, to the Secretary of Labor's decertification of New Hampshire's unemployment compensation law. Accordingly, the Anti-Injunction and Declaratory Judgment Acts were not an issue.

[21] Cross-Petition at 10.

[22] *Id.*

[23] *E.g.*, Miree v. DeKalb County, Ga., 433 U.S. 25, 27 n. 2 (1977); Gardner v. Toilet Goods Ass'n., 387 U.S. 167, 172 (1967).

[24] Compl. ¶¶ 9, 10(a) (Petition at 80a-81a).

defeat the court's jurisdiction, and thereby avoid resolution of one of the primary issues raised in the Complaint, by the simple expedient of rewriting cross-respondent's Complaint.

II. Burbank Has Standing To Sue Because the Injury Alleged Is Traceable to the Actions of Cross-Petitioners.

Finally, cross-petitioners argue that cross-respondent lacks standing to challenge the 1976 Amendments because California law, rather than the 1976 Amendments, requires cross-respondent to make payments for the unemployment compensation coverage of its employees, and that if the 1976 Amendments are held unconstitutional, "it still would be highly speculative whether the State of California would cease to require unemployment insurance contributions from [cross-] respondent."[25] This

[25]Cross-Petition at 11-12. The federal government has made virtually the same argument concerning standing in other cases challenging provisions of the FUTA. For example, in Cabais v. Egger, 527 F.Supp. 498 (D.D.C. 1981), *aff'd in part, rev'd in part* and *remanded*, 690 F.2d 234 (D.C. Cir. 1982); Rivera v. Patino, 524 F.Supp. 136 (N.D. Cal. 1981), *appeal pending*, No. 81-4473 (9th Cir. filed Sept. 8, 1981), private party plaintiffs challenged the pension/retirement pay offset provision of the FUTA, 26 U.S.C. § 3304(a)(15) (1976 & Supp. V 1981), and its respective state counterparts, and the federal government argued that plaintiffs lacked standing to sue the federal government because the amounts offset were offset only as a result of state law, *see Cabais*, 527 F.Supp. at 501-02; *Rivera*, 524 F.Supp. at 141-43. In *Rivera*, even California, which generally agreed with the federal government's position on the merits, joined in rejection of the federal government's position on standing: "the federal government would like to tiptoe out of this case so that irrespective of this court's holding, the federal government could continue to enforce its program elsewhere," Points and Authorities in Opposition to Motion for Preliminary Injunction and in Support of Motion To Dismiss at 2.

The district courts, while reaching different conclusion on the

argument, at best, represents a triumph of form over substance. The fallacy of cross-petitioners' argument is readily apparent from the language of the California statute[26] amending California's unemployment compensation law to extend unemployment compensation coverage to state and local employees.

That statute expressly provides that it was enacted "to implement Public Law 94-566 [the 1976 Amendments], which is hereby deemed to be a federal mandate' . . .," and that failure to conform to the Amendments "would seriously disrupt California's economy."[27] In *Village of*

merits, also rejected the federal government's standing argument. In *Cabais*, Judge Parker reasoned:

> [T]he government's insistence that plaintiffs can only obtain relief by challenging each state statute ignores what is indisputable – that at least some states enacted conforming legislation in direct response to the federal requirement. At least five such states have incorporated 'self-destruct' clauses in their state offset laws, applying the pension reduction provision only if required by federal law.

527 F.Supp. at 502 (footnote omitted). In *Rivera*, Judge Peckham reasoned, similarly, that "the legislative history of the state [California] enactments suggests quite strongly that they were enacted solely as a result of federal compulsion," and that "it is quite clear that there is a 'fairly traceable causal connection between the claimed injury and the challenged conduct.'" 524 F.Supp. at 142 (quoting Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 261 (1977) (emphasis added)).

In view of the virtual identity of argument, it is apparent that the federal government takes the position that no one has standing to challenge provisions of the FUTA because the federal government is in no way responsible for the consequences of unemployment compensation laws. It is also apparent that the federal government will continue to make the same standing argument until this Court resolves the issue. The instant suit provides the Court with the appropriate opportunity to resolve this issue.

[26] 1978 Cal. Stat. Ch. 2.

[27] *Id.* §§ 106,108 (Petition at 73a-76a).

Arlington Heights v. Metropolitan Housing Development Corp.,[28] this Court reiterated that the injury alleged only need be "fairly traceable to the defendant's acts or omissions" and may be indirect.[29] Apart from the fact that the moneys Burbank seeks to recover are in the possession of cross-petitioner Secretary of the Treasury, there is no question, in view of the language of the California statute, that the injury Burbank has alleged is traceable directly to the enactment and implementation of the 1976 Amendments. As a result, the requirements for standing are met.

The California statute also answers cross-petitioners' somewhat disingenuous argument that there is no indication that, if the 1976 Amendments are held unconstitutional, Burbank would not continue to be required to pay for unemployment compensation coverage of its employees. The statute specifically provides that, if the Court holds unconstitutional or invalid those provisions of the 1976 Amendments requiring California to extend unemployment compensation coverage to state and local employees, "then on the date the judgment or order of the [C]ourt becomes final . . . (a) [t]he provisions of this act to the extent that they relate solely or in part to unemployment insurance coverage for such [state and local] employees shall

[28] 429 U.S. 252 (1977).

[29] *Id.* at 261 (citing United States v. SCRAP, 412 U.S. 669, 688 (1973); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)).

to such extent be inoperative wholly or in part."[30] Under these circumstances, there may be no doubt that the injury for which cross-respondent seeks redress may be cured only by maintenance of this action against these cross-petitioners.[31]

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[30]1978 Cal. Stat. Ch. 2, § 104 (Petition at 73a-74a). Cross-Petitioners recognize this section of the California statute, but claim that that section does not cure Burbank's alleged lack of standing. Cross-Petition at 12 n. 9 The only explanation cross-petitioners offer for this otherwise unsupported assertion is that "a judgment of a district court would not trigger such a repeal." *Id.* In view of the lack of finality attaching to a district court decision, it is hardly surprising that California made the self-destruct clause of the statute contingent on a decision by this Court rather than an intermediate court from which review may be sought.

[31]Cross-Petitioners also suggest that California does not perceive or assert a violation of the tenth amendment to the Constitution, and that cross-respondent is an inappropriate party to assert such a violation. Again, one need only look to the California statute to see that California was deeply concerned with the coercive nature of the 1976 Amendments and the disruptive effects caused thereby, and supported challenges to the Amendments. 1978 Cal. Stat. Ch. 2, §§ 103, 104, 106, 108 (Petition at 73a-76a). In addition to the rights of California and the other States under the tenth amendment, political subdivisions such as Burbank also have tenth amendment rights. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976).

The tenth amendment, of course, is not the only right violated by the 1976 Amendments. As discussed more fully in the Petition, at 13-25, and the Brief of the City of Burbank in Reply, City of Burbank v. United States, *petition for cert. filed,* 51 U.S.L.W. 3,305 (U.S. Oct. 1, 1982) (No. 82-593), the 1976 Amendments violate established principles of federalism. In addition to the tenth amendment, the 1976 Amendments violate the doctrine of intergovernmental tax immunity and the Constitution's guarantee of a republican form of government. Cross-Respondent is also a proper party to assert these rights. *Id.*

CONCLUSION

For the foregoing reasons, cross-respondent does not object to this Court's granting of the Cross-Petition if the Court also grants cross-respondent's Petition.

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